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Supreme Court of the United States.

OCTOBER TERM, 1899.

The Cincinnati Street Railway Company,
Plaintiff in Error,

No. ~~304.~~ 110 *vs.*

Charles B. Snell,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR THE PLAINTIFF IN ERROR.

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Plaintiff in Error,

No. 364.] *vs.*

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Defendant in Error.

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BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT.

This is a proceeding in error to the Supreme Court of the State of Ohio. The case was begun in the Common Pleas Court of Hamilton County of that State. It was an action in tort of Snell, defendant in error, against the Street Railway Company, plaintiff in error, to recover damages for personal injuries which were alleged to have been caused by negligence of the Street Railway Company. The cause was tried in that court with a jury at the request of Snell and a verdict was rendered in favor of the Street Railway Company upon the merits on April 30, 1897 (R. 5). Motion for new

trial was made and overruled and judgment was rendered for defendant on the verdict May 22, following. The case being thus set down and tried upon plaintiff's request no objection was made to the empanneling of the jury, no exception was taken during the progress of the trial nor to the charge of the court under which the verdict was rendered; and no proceeding in error or otherwise to reverse the judgment so entered upon the verdict was ever begun or prosecuted, except only as we shall now proceed to describe (R. 3).

On November 27, 1896, at a term long prior to the trial just mentioned, the plaintiff below, Snell, made a motion for change of venue, and at the same time filed his own affidavit and also the affidavits of five other persons (R. 5). On December 26, 1896, this motion was overruled and exception taken. On January 27, 1897, a bill of exceptions was allowed and filed, showing what occurred upon the motion so overruled (Id). This bill of exceptions will be found at pp. 6–9 of the record.

The proceeding for change of venue was taken under section 5033 of the Revised Statutes of Ohio, to-wit:

> "Sec. 5033. When a corporation having more than fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he can not, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties."

It will be observed that the affidavits aforesaid, which alone the bill of exceptions comprises, state only that the Street Railway Company is a corporation having more than fifty stockholders in said Hamilton county, wherein the action is pending and its principal office is kept, and (in

Snell's affidavit) that he can not, "as he believes, have a fair and impartial trial in the said county:" and the five other affidavits only add that each affiant "believes that the said Charles B. Snell can not have a fair and impartial trial in the above entitled action in the said county" (R. 6-9).

After judgment on the merits as aforesaid in favor of the Street Railway Company, proceedings in error were begun and prosecuted in the state Circuit Court, sitting in Hamilton county, to reverse the judgment, because the motion for change of venue under the above section of the statutes of Ohio, 5033, was overruled. By leave of the Circuit Court, the Street Railway Company, defendant in error in that court, filed an amendment to its answer, wherein it alleged, among other things, that said Section 5033 was "in conflict with the Constitution of the United States, and more particularly with Section 1 of the Fourteenth Amendment thereof," and that the section is null and void for that reason (R. 4). On July 18, 1898, the judgment of the Common Pleas Court was affirmed by the Circuit Court (R. 4). On September 21, 1898, Snell began a proceeding in error in the Supreme Court of Ohio to reverse the judgment of the Circuit Court (R. 1-2). The only error assigned in that court upon which reliance was made was that the Circuit Court erred in affirming the judgment of the Court of Common Pleas, "which overruled and denied the motion of the plaintiffs in error to change the venue in the said action to the adjoining county from the said Hamilton county, most convenient to the parties to said action, pursuant to the provisions of Section 5033 of the Revised Statutes of Ohio (R. top p. 2).

On May 9, 1899, the Supreme Court of Ohio rendered final judgment in the cause, as follows:

> ". . . On consideration whereof it is ordered and adjudged by this court that the judgment of the said Circuit Court be and the same is hereby reversed, with costs: and, proceeding to render the judgment which

the court should have rendered, it is considered and adjudged that the judgment of the Court of Common Pleas be and the same is hereby reversed, with costs, for error in overruling the motion of plaintiff for a change of venue. . . .

"Ordered that a special mandate be sent to the Court of Common Pleas of Hamilton county to carry this judgment into execution" (R. 11).

On June 8, 1899, the Supreme Court of Ohio made an entry showing that the Street Railway Company raised the question in that court of invalidity of section 5033 of the Revised Statutes of Ohio, under the Fourteenth Amendment to the federal constitution, as follows:

"On motion of said defendant in error, The Cincinnati Street Railway Company, this court order it to be certified and made part of the record in this case and of the judgment and entry of reversal heretofore rendered and made herein that in the rendition of said judgment of reversal it became and was material to the case to determine whether the certain act of the General Assembly of the State of Ohio, known as and numbered section 5033 of the Revised Statutes of said State of Ohio, was of binding force and validity against the said Cincinnati Street Railway Company, a corporation created by and existing under the laws of said state.

"And the court order it to be further certified that said defendant in error claimed and asked this court to hold that said act, to-wit, section 5033 of said Revised Statutes, is repugnant to the first section of the fourteenth amendment of the Constitution of the United States.

"And the court order it to be further certified that the decision of the court was and is in favor of the validity of said statute.

"It is hereby further certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had." (R. 12.)

To reverse the judgment aforesaid of the Supreme Court of Ohio, the writ of error was allowed in this court June 29, 1899. (R. 14–16.) The decision below will be found in 60 Ohio St. 256.

ASSIGNMENT OF ERRORS.

The errors assigned at the time of the allowance of the writ of error will be found at page 16 of the record. So far as our argument is concerned, we rely upon the first one (R. 16):

> "That the Supreme Court of the State of Ohio erred in holding that section 5033 of the Revised Statutes of Ohio, involved in said cause, is not in conflict with the Constitution of the United States, and particularly with article fourteenth in amendment thereof."

PROPOSITIONS.

1. Section 5033 of the Revised Statutes of Ohio arbitrarily selects a certain portion of a type or class of persons (to-wit, corporations having fifty or more stockholders) and not only denies to them rights as actors in judicial proceedings which are accorded to the rest of the class, but also denies to them a substantial privilege which it grants to opposing litigants in the same cause; the statute therefore denies to such proscribed litigants the equal protection of the laws which is secured to all persons by section 1 of amendment fourteenth to the Federal Constitution.

2. The judgment sought to be reversed is a final judgment within the meaning of the act of Congress defining the appellate jurisdiction of this court.

ARGUMENT.

I.

In view of the exhaustive discussions and the decisions of this court, in *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, and *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews*, 174 U. S. 96, we do not think it necessary to burden the court with elaborate argument or citation of authorities to show that it is beyond the legislative power, either federal or state, to accord rights or privileges to one class of litigants which are denied to others under like or similar circumstances; or, in short, to deny them the right to stand equal before the law. This is especially true in a case, like this, which involves no statutory police regulations, but only the respective rights of parties in the administration of justice in civil actions.

An inspection of the statute in question, O. R. S., sec. 5033, p. 2, *supra*, will show that its purpose is, in an action to which a corporation having more than fifty stockholders is a party, to give to the opposite party, whether plaintiff or defendant, the right himself, when supported by five resident affiants, to change the venue of the cause. We say *himself* because, according to the interpretation of the Supreme Court of Ohio when such affidavits are filed, the court has no discretion, but is bound to order the change of venue. The statute, according to the court, does not require that the affidavits should state facts from which the court may itself deduce the conclusion as to whether a "fair and impartial trial" can or cannot be had in the county; but it only requires that each affiant shall state that "he believes" that such a trial cannot be had there. Such was the construction given to the act in this very case (*Snell* v. *Street Railway Co.*,

60 Ohio St., at 270). Thus, the right to change of venue so given to the party opposed to the corporation having fifty or more stockholders, is both substantial and arbitrary in its character; it leaves nothing for the court to do but to submit to the order demanded.

Now, our complaint is not that it is beyond the power of legislation to vest arbitrary right or power of this kind in a litigant; but it is that the right must be extended equally to all litigants in the case. It is true perhaps that the inducement to enact this statute was a belief that corporations having fifty or more stockholders might have an undue influence in the county in which their principal offices were kept. But this overlooks the common experience of everyone, that such corporations might be subject to undue local prejudice. It ignores the fact, too, that all or substantially all the stockholders might be non-residents of the county in which the principal office is kept; and what influence would non-resident stockholders have? It ignores the fact that *individuals* doing business in a particular locality may each have more than fifty employès.

The act seems to proceed upon the theory that numbers shall be the basis upon which the class shall be erected; but its conception of numbers appears only to indicate influence, and only to do so if the numbers comprise corporate stockholders. Plainly, mere numbers are not a natural and constant token of popular influence at all. Numbers may arouse prejudice as well as favor; indeed, we know they do. Nor can the attribute of either favor or prejudice be restricted to numbers of corporate stockholders; such attributes belong as well and naturally to groups of individuals who have no corporate connection whatever. A more natural and constant basis of favor or prejudice would be the character of business conducted than the number of persons engaged in it. It is easy to observe the differences in effect between kinds of business which on the one hand af-

fect large numbers of patrons or residents, such as gas, electric light, street railway and fertilizer companies, and kinds of business which on the other hand affect or arouse the attention of small numbers of citizens, such as ordinary manufacturing or commercial establishments.

The impediment to a fair and impartial trial by a jury, so far as the place of trial is concerned, is necessarily the existence of favor or prejudice for or against one of the parties to an action. The existence of such favor or prejudice cannot be predicated upon the mere fact of the number of those who are either directly or indirectly interested in the litigation; and consequently if the right to a change of venue is to be made to rest upon the belief of five or more affiants that such favor or prejudice for or against either party exists to prevent a fair trial, the law necessarily must accord to either party equally the right to a change of venue upon the existence of such belief.

The question, then, is, whether it is open to legislation to assume that the presence of mere numbers on one side or the other of a lawsuit may arouse for them such favor as to entitle the opposite party alone, and not either party, upon the sworn belief of five persons or otherwise, to a change of venue. Since prejudice as well as favor may be engendered by numbers, since character of business may be even more effective than numbers in producing either of these results, there is no sound basis for the discrimination which the present statute imposes. It might as well be said that the race to which one or the other of the litigants belongs, or his religious or political belief, or his wealth or poverty, or even sex or other physical attributes, should be the token for according or denying to the opposite party alone the privilege, upon the affidavits of belief mentioned in this statute, to have a change of venue. If the belief of five affiants in the existence of favor or prejudice is made the ground of an absolute right to change of venue, the ex-

istence of that belief, however occasioned, must entitle not merely one of the litigants, but must equally entitle every litigant to the right.

We desire in this connection to call attention to section 5032 of the Revised Statutes of Ohio. That statute provides in substance that if upon complaint made by any party to a law-suit, it is made to appear to the satisfaction of *the court*, that a fair and impartial trial cannot be had, the court may order a change of venue. But the section in question leaves nothing to the court in this class of cases except to ascertain whether or not one of the litigants making the application, and five persons swear that they believe that a fair and impartial trial cannot be had. It then becomes the imperative duty of the court to order the change of venue. The point of difference which we wish to make clear at this stage is not alone the difference in function which the two statutes vest in the courts, but also and particularly that under section 5032 any and all of the parties to the litigation are given the right to a change of venue, while under section 5033 "the opposite party" alone is given that right. In the latter case, in the language of this court in *Gulf, Colorado & Santa Fe R. R. Co.* v. *Ellis*, *supra*, litigants "do not enter the courts upon equal terms. In the suit in which they are parties they are discriminated against and not treated as others. They do not stand equal before the law. They do not receive its equal protection." (Id., at p. 153.)

The principles laid down in the decision of the case last cited are totally ignored by the decision of the Supreme Court of Ohio in this case. In the first place that court, as it seems to us, erroneously conceives that the legislation now in dispute does not differ in principle from those Ohio statutes which require actions brought against individuals to be brought in the county where they reside, or generally against corporations in the county in which they are situated or have their principal offices or agents; whereas, actions

may be brought against insurance companies in the county where the cause of action arises, against a mining corporation in the county in which it owns or operates its mines, and against railroad companies in any county in which the roads run. (60 Ohio St., at 267, 268.) Our criticism upon this is, that these are not analogous statutes. In order to make them correspond with the one in dispute, they would have to separate individuals and also separate corporations of the same kind, and allow suits to be brought against part of them in one place, and against the rest in another and different place, although all the individuals or all the corporations would be identical both as to circumstances and location. Would that court, or would any court say that the individuals and corporations residing in the eastern counties of the state could be sued differently as to locality and the like, from individuals and corporations residing in the western counties of the state?

Another alleged analogy employed by that court deserves a word of comment. It says, at page 269, that the principle of this statute is like that of the act of Congress relating to the removal of causes in cases of diverse citizenship, in that the citizen of the state in which the suit is brought is not permitted, while the citizen of the other state is permitted, to have the cause removed to a federal court. We need not stay to discuss the power of Congress in this behalf under Section 2, of Article III, of the Federal Constitution. But suppose an act of Congress were to provide that the citizen of the other state could have removal only in the event of the resident citizen belonging to a particular race, or having a particular religious or political belief, or being a corporation and having a specified corporate object or number of stockholders, or the like, would any one claim that the act would stand for a moment? The validity of the Removal Act lies in the equal rights it affords to all non-

residents as against all residents of the state in which the action is brought.

The court below attempted to distinguish the present case from *Coal Co.* v. *Rosser*, 53 Ohio St. 12, and just why it did not at the same time attempt to distinguish the present case from *Gulf, Colorado & Santa Fè Ry. Co.* v. *Ellis, supra*, we do not know. We do know that both cases were cited to the court. The effort to distinguish *Coal Co.* v. *Rosser* seems to have gone upon the theory that the statute there involved imposed a penalty in the way of an attorney's fee upon one party to the suit, which as to the other party under like conditions it did not do. Can it be that the imposition upon one party of a charge as counsel fee differs in principle from the case of the denial of a substantial right to one party which is given to the other? That, as it seems to us, would be to reduce the equality of right guaranteed by the Constitution to the mere question of a money charge. But even if this were so, the extra expenditure of money imposed by the change of venue through the exercise of the right given to one and not to the other litigant, would furnish the requisite condition.

II.

The judgment in question is final within the meaning of the act of Congres defining the appellate jurisdiction of this court.

We may say in passing that we have already shown in the preliminary statement of this brief, that the Street Railway Company obtained a judgment upon the merits of this cause without objection or exception on the part of the plaintiff in error, except only as to the overruling of the motion for a change of venue. The Street Railway Company is entitled to that judgment, and ought not to be deprived of the ben-

efit of it or subjected to another trial of the questions involved under it, unless Snell was in truth validly entitled to the change of venue in question. If section 5033 is invalid under the Fourteenth Amendment, then there can be no warrant for depriving the Street Railway Company of the benefit of the verdict of the jury and the judgment upon it of the court below. If the judgment of the state Supreme Court of which we complain is reversed upon the grounds which we have submitted, it determines the litigation.

But it is not merely of the judgment upon the verdict that we wish to speak. We go further. We repeat that the judgment of the Supreme Court of Ohio, which we are now seeking to reverse, is of itself a final judgment within the appellate jurisdiction of this court. That judgment related to and involved only the question of the right of Snell to the change of venue. Nothing else was brought upon the record to the Supreme Court of the state, and nothing else was or could be decided by that court. Even an affirmance of that judgment could affect nothing else.

The question presented upon the error assigned in the Supreme Court of the state was a question that involved the final determination of the right of the parties, for if the cause was tried below in the proper tribunal there was no controversy in the Supreme Court, but that the proper judgment had been rendered. It is not always true that a reversal of the judgment of an inferior tribunal by the Supreme Court of a state and remanding of the cause to the inferior tribunal, is not reviewable in this court. The judgment of the Supreme Court of Ohio was final as to the right of the Street Railway Company to have the cause against it tried within the jurisdiction of its corporate residence, and so to avoid the expense and inconvenience and burden of a trial in another and different jurisdiction. We submit that it has the right to have this court review this decision of the Supreme Court of Ohio as a final judgment upon the question whether

the railway company can be deprived of this right by a statute that is in conflict with the Federal Constitution.

Weston et al. v. *The City Council of Charleston*, 2 Pet. 449.

O'Dowd v. *Russell*, 14 Wall. 402.

We therefore ask a reversal of the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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